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CLERK U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
YOUNGSTOWNUNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE:

Timothy Motichko and Cynthia  
Motichko

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Timothy Motichko and Cynthia  
Motichko  
108 Morrison St  
Struthers Oh 44471

Plaintiffs,

vs.

Premium Asset Recovery Corp.  
350 Jim Moran Blvd  
STE 210  
Deerfield Beach, FL 33442

Defendant.

CASE NO: 05-40662-kw

ADV. PRO. NO. 08-04055

JUDGE KAY WOODS

COMPLAINT

**RESPONSE MEMORANDUM TO DEFENDANTS MOTION TO DISMISS****I. DISCHARGE INJUNCTION**  
*ADVERSARY v. CONTESTED MATTER*

The Defendants first issue is that Count One of the complaint for Willful Violation of the Discharge Injunction should be dismissed because the action should have been brought by motion as a contested matter instead of as an Adversary Proceeding. The Defendant states that BR 7001 limits what actions can be brought as adversary proceedings. However, BR 7001 does not limit what actions may be brought as an adversary proceeding but states what actions must be brought as

an adversary proceeding rather than by contested matter. The essential difference between an adversary proceeding and a contested matter centers on the notice requirements of the action. In an adversary proceeding, the Defendant is provided with the procedural safeguards of formal notice and summons. On the other hand, a contested matter may be commenced simply through motion practice. In *In Re Fuller*, the Court stated:

“What distinguishes an adversary proceeding from a contested matter is that an adversary proceeding must be commenced by the filing and service of a complaint which meets specific notice and formatting requirements.” 255 B.R. 300, 305-306 (ED Mich. 2000). The Court went on further to state that “The Supreme Court determined that the relief sought in any of the matters described in subsections (1) through (10) of Rule 7001 was of sufficient consequence to the affected party that the party deserved something more than a copy of a generic motion which may have been mailed to countless other creditors...” Id.

It is clear that the underlying policy for certain actions to be brought as adversary proceedings is for the protection of due process for the Defendant, including the formal notice and summons. While a discharge injunction can be brought by motion as a contested matter, the filing of the discharge injunction as an adversary proceeding actually affords the Defendant a higher degree of protection of their constitutional rights. Therefore, there is no reason to dismiss Count One of the complaint to simply have the case brought as a motion.

The remainder of the Defendant’s Motion to Dismiss is moot as the Plaintiff has filed a notice of dismissal as to Count Two and Count Three.

WHEREFORE, the Plaintiffs request this Honorable Court to deny the Defendant’s Motion to Dismiss as to Count One.

Respectfully Submitted,

/s/Philip D. Zuzolo

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Response Memorandum has been filed with the Court ECF/CM system and sent by regular US Mail on this 2<sup>nd</sup> day of June 2008 to the following:

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